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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Owens-Illinois, Inc. ("Owens-Illinois") respectfully submits this brief as *amicus curiae* in support of Respondents with the consent of the parties. The letters of consent from counsel for Petitioners and Respondents have been filed with the Clerk of the Court.

Owens-Illinois has a significant interest here because it is one of the defendants in the asbestos-related personal

injury litigation. Owens-Illinois is, and always has been, primarily a manufacturer of glass bottles and jars. Its involvement in the asbestos-related personal injury litigation stems from a single type of insulation material known by the name "Kaylo," which contained approximately 15% asbestos. Owens-Illinois first manufactured Kaylo in commercial quantities in the late 1940's, and it ceased all manufacture of this product in April 1958—longer than three decades ago.

Today, because of this single product that it ceased making 35 years ago, Owens-Illinois is one of the defendants in tens of thousands of personal injury cases across the country. The Judicial Panel on Multidistrict Litigation has transferred virtually all of the approximately 30,000 asbestos cases pending in federal court to Judge Charles Weiner of the U.S. District Court for the Eastern District of Pennsylvania. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

In January 1993, a purported class action was filed in federal court in Philadelphia that seeks judicial approval of a prearranged settlement of all *future* asbestos claims against the twenty companies represented by the Center for Claims Resolution ("CCR"). *Carlough v. Anchem Products, Inc.*, No. 93-CV-0215 (E.D. Pa. filed Jan. 15, 1993) ("CCR Class Action"). (Reported decisions in this case include *Carlough*, No. 93-CV-0215, 1993 WL 399674 (E.D. Pa. Oct. 6, 1993); *Carlough v. Anchem Products, Inc.*, No. 93-1482, 1993 WL 492511 (3d Cir. Dec. 1, 1993).) The CCR Class Action is based on the federal court's diversity jurisdiction under 28 U.S.C.A. § 1332 (Supp. 1993), and the named plaintiffs allege that they represent a class including a substantial number of persons who have no contact with Pennsylvania. The CCR Class Action is opposed by many class members. *See* Frederick M. Baron, *An Asbestos Settlement With A Hidden Agenda*, Wall St. J., May 6, 1993, at A15.

Although Owens-Illinois is not a party to the CCR Class Action, it is vitally concerned with the question whether the federal courts in diversity cases have the authority under the Due Process Clause to enter judgments that bind absent class members having no contact with the forum state. The prearranged settlement of the CCR Class Action, if approved, would adversely affect Owens-Illinois' contribution and settlement credit rights. Owens-Illinois submits that in general this question should be answered in the negative, and therefore it urges this Court to affirm the judgment below. There should be, however, an important exception to this general rule for class actions under Fed. R. Civ P. 23(b)(1)(B) where the defendant holds a "limited fund" and suits by individual members of a class would result in an inequitable distribution of the defendant's resources.

SUMMARY OF ARGUMENT

The due process principles addressed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), should apply with equal force to class actions in federal court, especially where jurisdiction is based on diversity. With respect to personal jurisdiction, a federal court sitting in diversity is not subject to different due process principles than is a state court. A nationwide mandatory class action for money damages, based solely on diversity jurisdiction, can satisfy due process only where the case involves a limited fund.

In *Ticor Title*, the Court should apply *Shutts* to federal court class actions for money damages. This Court should recognize, however, that in some circumstances a nationwide mandatory class action under Fed. R. Civ. P. 23(b)(1)(B) may be the *only* fair way to apportion a "limited fund" held by a defendant. A right to "opt out" of a limited fund class action causes the claimants to compete for the fund and creates a risk of unfair dis-

tribution. Where, however, a defendant's assets are adequate to satisfy the claims against it, and a diversity class action is being used merely to impose a global settlement, the Due Process Clause should prohibit the entry of any judgment purporting to bind class members having no contact with the forum state.

ARGUMENT

I. FEDERAL COURTS, IN THE ABSENCE OF A FEDERAL STATUTE EXTENDING THEIR JURISDICTION, SHOULD BE SUBJECT TO THE SAME DUE PROCESS LIMITS AS STATE COURTS

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), this Court held that a forum state may bind an absent class member concerning "a claim wholly or predominantly for money damages" only by providing minimal due process protection, including the opportunity for class members to "opt out." *Id.* at 811-12. The due process principles articulated in *Shutts* concern both procedural fairness and the question of jurisdiction over class members who are "absent" in the sense that they are unnamed in the complaint and have no contact with the state in which the forum federal court sits.

Petitioners' argument that due process concerns with respect to plaintiff classes are different in federal courts than in state courts is not analytically sound. Under Petitioners' theory, a federal court exercising diversity jurisdiction could bind "absent" class members through a mandatory class, but a state court in the same forum with the same case could not. This result is more consistent with *Swift v. Tyson,* 16 Pet. 1, 41 U.S. 1 (1842), than with federalism. It is also inconsistent with the jurisdictional rules that apply in federal court cases whether they are based upon diversity of citizenship or a federal question: Due process requires "minimum contacts" with the forum *state* for personal jurisdiction in both state and federal courts. *See International Shoe Co. v. Washington,*

326 U.S. 310 (1945); *In re Real Estate Title,* 869 F.2d 760, 766 n.6 (3d Cir.) (minimum contacts requirement for personal jurisdiction applies to federal courts having subject matter jurisdiction on the basis of diversity of citizenship or a federal claim), *cert. denied,* 493 U.S. 821 (1989). In the absence of a specific statute providing for nationwide service of process, personal jurisdiction over nonresident defendants can be based only on their amenability to service under state long-arm statutes, *Omni Capital Int'l v. Rudolf Wolff & Co.,* 484 U.S. 97 (1987); Fed. R. Civ. P. 4 (incorporating the manner of serving process prescribed by the law of the state in which the federal court is sitting or the law of the state in which service is made), and the same principle should be applied to absent class members in class actions for money damages.

The CCR Class Action has given the Third Circuit the "opportunity to examine *Shutts* and to reaffirm the critical importance of the right to opt out in drawing any inference of consent to jurisdiction by absent class members who otherwise would have no affiliation with the forum." *Carlough v. Anchem Products, Inc.,* No. 93-1482, 1993 WL 492511, at *7 (3d Cir. Dec. 1, 1993). The CCR Class Action is based solely upon diversity, and the Third Circuit held that "the minimum contacts requirement for personal jurisdiction applies to *federal courts* having subject matter jurisdiction on the basis of diversity of citizenship as well as cases brought on the basis of a federal claim." *Id.* at *6 (citing *In re Real Estate Title,* 869 F.2d at 766 n.6) (emphasis supplied). Consequently, the Third Circuit found that the district court lacked personal jurisdiction over absent class members before the class members were given the right to opt out:

> We do not believe that the mere promise, even certain eventuality, that the opportunity to opt out of the class will be offered to absent class plaintiffs satisfies the requirements of due process as defined by *Shutts*. . . . Because of this emphasis by the Supreme Court [in *Shutts*] on *the receipt of the opt out forms,*

> we reject the district court's implication here that the opt out requirement is satisfied in all cases where a class action will provide for the opportunity to opt out.
>
> Thus, prior to notice and the opt out period, and absent minimum contacts with the Pennsylvania forum or consent to its jurisdiction, a federal injunction enjoining state action would violate due process.

Id. at *8 (emphasis supplied).

The Third Circuit thus appropriately focused on "the receipt of the opt-out forms" by the putative class members as an essential element of due process under *Shutts*. The Due Process Clause should permit nothing less.

II. WHERE A CLASS ACTION SEEKS DAMAGES FROM A LIMITED FUND, DUE PROCESS SHOULD PERMIT ABSENT CLASS MEMBERS TO BE BOUND WITHOUT A RIGHT TO OPT OUT

A limited fund class action under Fed. R. Civ. P. 23(b)(1)(B) can ensure that competing claims to limited funds are equitably apportioned. A limited fund is triggered where separate actions "create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . ." Fed. R. Civ. P. 23(b)(1)(B). The 1966 advisory committee notes to Fed. R. Civ. P. 23 explicitly recognize the existence of limited fund class actions under subsection (b)(1) of the Rule. Advisory Committee's Note to Rule 23, 39 F.R.D. 98 (1966).

The concept of mandatory Rule 23(b)(1)(B) class actions has been endorsed by a number of the lower federal courts, including the Ninth Circuit. *See, e.g., In re Northern Dist. of Cal. Dalkon Shield I.U.D. Prod. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982) (although

class certification was reversed, the court stated that a Rule 23(b)(1)(B) class may be appropriate when separate punitive damage claims necessarily will affect later claims), *cert. denied*, 459 U.S. 1171 (1983); *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1086 (9th Cir. 1975) (permitting class certification under 23(b)(1)(B) only if separate actions "inescapably will alter the substance of the rights of others having similar claims"), *cert. denied*, 425 U.S. 911 (1976); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973) (classes seeking limited fund certification must demonstrate that "individual action inescapably will alter the substance of the rights of others having similar claims"); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (endorsing limited fund theory as a justification for a punitive damages class certification, but held class certification was inappropriate because of lack of evidence of a limited fund); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 724-28 (E.D.N.Y. 1983) (certification of a group of plaintiffs claiming injury from "Agent Orange"), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1417-18 (E.D.N.Y. 1989) (plaintiffs met "substantial probability" test that their claims, if sustained, exceeded the defendant's assets, and therefore case was appropriate for 23(b)(1)(B) certification), *aff'd*, 907 F.2d 1295 (2d Cir. 1990).

The Ninth Circuit in *Ticor Title* recognized that a class judgment granting injunctive relief, as opposed to money damages, could bind absent plaintiffs even without an opt-out right, because there is no fair alternative. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted in part*, 62 U.S.L.W. 3205 (U.S. Oct. 5, 1993) (No. 92-1988). Similar considerations support a mandatory class action involving claims for money damages where the defendant's financial resources are inadequate to satisfy the claims of the plaintiff class. A na-

tionwide mandatory class action under Rule 23(b)(1)(B) may be the only fair way to divide a limited fund, and in that event fundamental fairness may justify the loss of the right to opt out of the class. The only alternative might be a multistate scramble for assets that could hardly be characterized as due process of law.

CONCLUSION

The judgment below should be affirmed.

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